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Nos. 80-2122 and 81-350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Illinois Central Gulf Railroad Company,
Petitioner in No. 80-2122,

Interstate Commerce Commission,
Petitioner in No. 81-350,

v.

City of Cherokee, Rock Rapids Community Affairs Corporation, Farmer's Co-Op, Archer Co-Op, Calumet Feed Service, K-F Motors, Metz Baking Company, Ray Halder AGG Lime Service, Rowena Elevator & Mill, L. C. Burkhalter and M. S. Stuckey,
Respondents.

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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September 9, 1981

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Pursuant to Rule 36.1 of the Rules of this Court, the Association of American Railroads ("AAR") hereby files its brief as *amicus curiae* in support of the petitions for a writ of certiorari filed by the Illinois Central Gulf Railroad Company ("ICG") in No. 80-2122 and by the Interstate Commerce Commission ("Commission") in No. 81-350, seeking review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit. Written consent of the parties to file this brief has been obtained and is being filed on this date under separate cover with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Association of American Railroads is a voluntary, unincorporated, non-profit organization composed of member railroad companies operating in the United States, Canada, and Mexico.[1] The Class I member railroads operate 92 percent of the total trackage, employ 94 percent of the workers, and generate approximately 97 percent of the total freight revenues of all railroads in the United States. In addition to the Class I railroads, the AAR represents the interests of several hundred smaller railroads, terminal companies and switching lines.

The activities of the AAR include research, operations, car service, safety, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public. The AAR is a joint representative and agent of its member railroads in connection with federal legislation, regulation, and legal matters of common concern to the rail industry as a whole. It has an interest in significant interpretations of federal legislation or agency regulations that will apply generally to all of its members.

The issues raised in the present case by ICG and by the Commission are of very great importance to the members of the AAR. Many of the members operate lines as to which they have applied, or plan to apply in the future, for authority to abandon. As will be described *infra*, the rejection of the Commission's cost calculations and determination of the "public convenience and necessity" by the majority opinion of the Court of Appeals is not only erroneous, but also poses a serious threat to the financial health and viability of many of the Nation's railroads, most of which are already in poor financial health, by making abandonments vir-

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[1]The members of the AAR are listed in the Appendix to this brief.

tually impossible in the future.[2] If allowed to stand, the majority opinion would frustrate the goal of the railroads (and of Congress, as set forth in the Interstate Commerce Act) of achieving an adequate rail transportation system in the United States.

SUMMARY OF ARGUMENT

The AAR agrees with the Illinois Central Gulf Railroad Company and the Interstate Commerce Commission that this case raises several important questions warranting review by this Court.

First, if allowed to stand, the majority opinion of the Court of Appeals would undermine many of the important provisions and

[2]The Commission has found on many occasions that the financial condition of the Nation's railroads as a whole is extremely poor. For example, when it permitted a general rate increase proposed by the railroads to take effect in July 1980, the Commission found that the railroads had been earning inadequate revenues. The traditional (unadjusted for taxes) rates of return on investment of the railroads as a group were 1.7 percent in 1977 and 1978, and 3.0 percent in 1979 (5.1 percent if Conrail were excluded). The tax-adjusted rates of return were 1.1 percent in 1977 and 2.10 percent in 1979 (4.3 percent if Conrail were excluded). During this period, railroads in the East showed a composite deficit. Even after the Commission permitted the July 1980 general increase, the railroads' tax adjusted rate of return on investment was only 4.05 percent—far below the 11 percent figure which the Commission had then determined to be the minimum adequate rate—and the Eastern railroads continued to operate at a deficit. *See* Ex Parte No. 375 (Sub-No. 1), *Increased Freight Rates and Charges 1980—Nationwide—Phase II* (Commission decision served July 3, 1980).

In March 1981, the Commission determined that 11.7 percent was the minimum rate of return on investment necessary for a railroad to earn adequate revenues within the meaning of the new Rule of Ratemaking for Railroads, 49 U.S.C. §10704(a)(2) (which requires the Commission to maintain necessary standards and procedures for establishing revenue levels for rail carriers adequate to cover total operating expenses, including depreciation and obsolescence, plus a reasonable return on capital). The Commission further found that only 3 of 35 Class I railroads whose records it examined earned adequate revenues under this standard. *See Standards For Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981).

purposes of the Interstate Commerce Act. The majority opinion wrongly excludes labor costs—a substantial portion of the cost of service over a rail line—from the Interstate Commerce Commission's consideration of where the public convenience and necessity lies. By so holding, the majority opinion seriously impairs the discretion and powers of the Commission in abandonment cases and poses a serious threat to the financial viability of the Nation's railroads, which as a whole are already in anemic financial condition. Because of the large number of collective bargaining agreements between railroads and labor unions, the decision of the Court of Appeals that the crew wages at issue are not "avoidable costs" (due to the alleged provisions of the collective bargaining agreement), and that such wages may therefore not be considered as expenses by the Commission in determining whether a line is profitable, would virtually compel the Commission to deny applications for abandonment of many lines which are, in economic reality, unprofitable. Prevention of abandonments on the basis of such a rigid interpretation of the avoidable cost concept would prevent the Commission from determining abandonment applications on the basis of the "public convenience and necessity," as Congress required in the Interstate Commerce Act. In addition, the majority opinion's approach of substituting its views of the public convenience and necessity for that of the Commission (whose analysis the majority opinion distorted or refused to acknowledge) effectively divests the Commission of its final and exclusive authority in abandonment cases by making the Commission's determination of the public convenience and necessity a matter for judicial redecision—contrary to prior holdings of this Court.

The majority opinion of the Court of Appeals also poses a serious threat to the national policy (reflected in Section 10903(b) of the Interstate Commerce Act) of encouraging agreements between railroads and unions for the protection of workers affected by abandonments. By ruling that the wage payments at issue are not avoidable costs because of the alleged existence of such an

agreement, the majority opinion of the Court of Appeals would tend to deter railroads from entering into any such agreements in the future.

Second, the majority opinion decision of the Court of Appeals for the Eighth Circuit is in fundamental conflict with prior decisions of the courts of appeals allowing the Commission to take an economically realistic view of railroad costs in abandonment cases. The majority opinion is inconsistent with the recent decision of the Court of Appeals for the Seventh Circuit in *International Minerals & Chemical Corp.* v. *ICC*, ___ F.2d ___ (Nos. 80-2096 and 80-2097) (August 3, 1981), which upheld a Commission determination that certain crew wages were avoidable costs. In both the *City of Cherokee* and *International Minerals* cases, opponents of abandonment had argued that certain wages were not avoidable costs because the railroad would continue to employ the workers and pay them following abandonment. The Eighth Circuit erroneously agreed with this contention; the Seventh Circuit correctly rejected it, upholding the reasoning of the very Commission decision which was reversed by the Court of Appeals for the Eighth Circuit. Furthermore, the majority opinion's holding that a railroad expense may not be considered by the Commission in its determination of the profitability of a line if the expense cannot be avoided *immediately* upon abandonment is contrary to prior decisions of the courts of appeals which have held that the opportunity cost of a line may be taken into consideration by the Commission.

Third, the approach of the Court of Appeals in reviewing the agency decision was fundamentally improper. In reversing the Commission's determination that certain crew wages constituted avoidable costs, the Court of Appeals based its decision on a clearly erroneous characterization of the Commission's analysis. The Court of Appeals also acted inconsistently in holding that ICG's property taxes on the line were avoidable costs, while the crew wages—which, like property taxes, could not be eliminated

immediately upon abandonment—were not. Furthermore, by comparing the decisions of the Commission and the ALJ whose recommendations it rejected, the Court of Appeals applied a standard of review plainly forbidden by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), and *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). Finally, the Court of Appeals acted arbitrarily and capriciously in reaching out and deciding an issue which *none* of the parties before that court had raised.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Is Contrary to the Provisions of, and Policies Underlying, the Interstate Commerce Act

Under the Interstate Commerce Act, a railroad line may be abandoned if such abandonment is required or permitted by the present or future public convenience and necessity (49 U.S.C. §10903(a)). Congress intended that the determination of the "public convenience and necessity" be made *exclusively* by the Interstate Commerce Commission. The abandonment provisions of the Interstate Commerce Act were intended to establish a means for railroads, subject to Commission approval, to divest themselves of unprofitable lines and thereby facilitate the provision of adequate rail service to the public. The decision of the majority of the Court of Appeals is directly contrary to this central purpose.

The abandonment provisions of the Interstate Commerce Act were originally enacted by Congress in Section 402 of the Transportation Act of 1920 (41 Stat. 456, 477). This Court recognized shortly after the passage of the Act, and in subsequent cases, that Congress intended to vest exclusively in the Commission the responsibility for determining whether the public convenience and

necessity permitted an abandonment.[3] The Court also recognized that the ultimate goal of the abandonment provisions was the achievement of adequate rail service to the public. Prior to the enactment of the 1920 Act, many railroads had been on the brink of financial ruin because of the necessity of operating uneconomical or superfluous lines. By providing a means for railroads to free themselves of such lines, the statutory scheme removed an obstruction that might otherwise prevent railroads from performing their statutory duty as common carriers. As a result, interstate commerce would be protected from undue burdens. *E.g.*, *City of Yonkers* v. *United States*, 320 U.S. 685, 690 (1944); *Transit Commission* v. *United States*, 289 U.S. 121, 128 (1933); *Texas & N.O. R.R.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479 (1928).

The purposes underlying the abandonment provisions of the Interstate Commerce Act have not changed since their original enactment in 1920, although the provisions themselves have been modified. Indeed, the modifications that have been made have been intended to promote those purposes by further facilitating abandonments. In response to the financial crisis of major railroads in the Northeast and Midwest regions in the late 1960's and early 1970's, Congress passed the Regional Rail Reorganization Act of 1973, which facilitated abandonments of unprofitable lines by these railroads. When it became apparent that the financial problems of railroads were nationwide rather than regional, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976, which sought to accomplish on a national scale what the 1973 Act had sought to accomplish in a particular region. *See, e.g.*, *Southeastern Pennsylvania Transportation Authority* v. *ICC*, 644 F.2d 238, 240-43 (3d Cir. 1981). In the

[3] *See, e.g.*, *Transit Commission* v. *United States*, 289 U.S. 121, 128 (1933); *Colorado* v. *United States*, 271 U.S. 153, 162-68 (1926); *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U.S. 341, 348 (1924); *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 478 (1924); *Texas* v. *Eastern Texas R. R.*, 258 U.S. 204, 213 (1922).

Staggers Rail Act of 1980, Congress again attempted to facilitate abandonments by limiting the duration of Commission investigations of abandonment applications in order to protect railroads from unnecessarily protracted proceedings. *H. Rep. No.* 96-1430, 96th Cong., 2d Sess. 125 (1980).

Thus, since 1920, the Congress has entrusted to the Commission the exclusive responsibility for determining whether the "public convenience and necessity" requires or permits an abandonment. In making that determination, the Commission must balance the benefit of abandonment to the railroad against the inconvenience which abandonment would cause to shippers and communities served by the line. *Colorado* v. *United States*, 271 U.S. 153, 168-69 (1926). One factor in the Commission's balancing analysis is the profitability of the line, which the Commission has determined through the use of the concept of "avoidable costs." Normally, if operations over the line are so costly as to impair railroad service on other branches, abandonment is permitted. However, even a profitable line may be abandoned if the earnings on the line are inadequate.[4]

[4] *See, e.g., Purcell* v. *United States*, 315 U.S. 381 (1942). As was held by a three-judge court in *Commonwealth of Pennsylvania* v. *United States*, 361 F.Supp. 208, 219 (M.D. Pa.), *aff'd on appeal*, 414 U.S. 1017 (1973):

> "Although it is true a minimally profitable line may impose but a slight burden on an overall railroad, even that slight burden may outweigh the local interest in maintenance of the line. The burden of a minimally profitable line exists because of the nature of the regulated railroad industry. Until a certificate of abandonment is granted, a railroad is required to provide services on its tracks. To provide these services, expenditures will be required to maintain the line in operating condition. Expenditures used on this line will not be available for maintenance of other more profitable lines. It is thus possible for a railroad, limited in its ability to finance track rehabilitation and improvements, to be hindered in its provision of more essential service on other lines by the need to maintain minimally profitable lines. A burden on other commerce may be pres-

(Footnote continued on following page.)

The decision of the Court of Appeals is flatly inconsistent with the provisions and underlying purposes of the abandonment section of the Interstate Commerce Act in several respects.

First, the majority's ruling that the Commission may not consider wages in analyzing the profitability of the line in question is wholly unrealistic. Labor costs form a substantial part of a railroad's costs of service. Where (as was the case in *City of Cherokee*) these labor services are performed *solely* in connection with the operation of the line, the Commission must be permitted to take the cost of such services into account in determining what the "public convenience and necessity" requires or permits. By ruling to the contrary, the majority decision of the Court of Appeals will result in the denial of a large number of meritorious abandonment applications, because essentially the same factual circumstances present in *City of Cherokee* are certain to be present in many future abandonment cases. As the Commission stated in its petition for certiorari, many railroads have made agreements with labor unions protecting workers from discharge upon abandonment. There was no dispute in the *City of Cherokee* case that if the wages in question were included as part of the avoidable costs, the line in question would have shown a loss, rather than the "profit" which resulted after the exclusion of wage expenses on the basis of an alleged collective bargaining agreement. Instead, as a result of that exclusion by the ALJ (which the majority opinion of the Court of Appeals affirmed), the railroad showed a "paper," or imaginary, profit. This ostensible profitability was a critically important factor in the recommendation of the ALJ (which the Commission rejected) that the application for abandonment be denied. The approach and reasoning of the ALJ and the majority of the Court of Appeals will undoubtedly lead to the same result

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(Footnote continued from previous page.)

ent, therefore, in maintaining even a profitable line. It is therefore unreasonable for the plaintiffs to assume the I.C.C. must always turn down applications for abandonment of profitable lines."

in many future abandonment cases if the majority opinion of the Court of Appeals is allowed to stand.

Indeed, the *City of Cherokee* decision has *already* resulted in the denial of abandonment applications where, in reliance on the Eighth Circuit's majority opinion, administrative law judges of the Commission have ruled that certain wages are *not* avoidable costs, thus producing an imaginary "profit" on lines that are in fact unprofitable.[5] In each instance, certain wages were excluded on the grounds that the railroad was obligated to pay those wages even after abandonment, and the applications for abandonment

[5]In Docket No. AB-43 (Sub-No. 58), *Illinois Central Gulf Railroad Co.—Abandonment Near Rosedale and Greenville in Washington and Bolivar Counties, MS* (decision served April 15, 1981), an ALJ ruled that crew wages were not avoidable costs because a union witness had testified that the employees would be transferred to another line following abandonment. Because of this exclusion (which the ALJ based on the *City of Cherokee* decision), the recomputed revenues and avoidable costs of the line were equal, whereas under the railroad's cost calculations the avoidable costs had exceeded revenues by $107,000 (*id.* at 5-6, 21-22).

Similarly, in Docket No. AB-43 (Sub-No. 71F), *Illinois Central Gulf Railroad Company—Abandonment—Between Columbia and Silver Creek, MS* (decision served June 4, 1981), an ALJ relied on *City of Cherokee* in ruling that part or all of the wages for enginemen, trainmen, and station employees were not avoidable costs because: (1) the engineers would be "bumped back" to firemen or placed on the engineer's extra board pursuant to a union agreement; (2) any trainmen jobs eliminated would be at the extra board level; (3) station employees would continue to work for the railroad after abandonment. As a result of these exclusions, avoidable costs were reduced by $150,000, and revenues then exceeded avoidable costs by $59,000. Under the railroad's original computations, avoidable costs had exceeded revenues by $126,000 (*id.* at 10-12, App. A-C).

Finally, an ALJ ruled in a case decided in May 1981 that, as a result of *City of Cherokee*, crew wages were not "avoidable costs" if the railroad planned to assign the crews to other parts of the rail system following abandonment (ICG's Petition for Certiorari, at 23 n.23). *See* Docket No. AB-18 (Sub-No. 35F), *Chesapeake and Ohio Railway Company—Abandonment—Near South Haven and Hartford in Van Buren County, Michigan* (decision served May 14, 1981, at 5, 7).

were denied. Continuation of this trend would be financially disastrous for the railroads of the nation, which as a whole are already in serious financial condition.

Second, the Court of Appeals has effectively divested the Commission of its final and exclusive authority in abandonment cases. The majority opinion distorts the analysis of the Commission, accusing the Commission of stating only that it will allow abandonments when the carrier cannot operate the line as a profitable going concern and can turn a greater profit through abandoning the line and selling its property holdings. In reality, as ICG and the Commission demonstrated in their petitions, the Commission and Division 1 (whose findings the Commission adopted by reference) balanced the needs of shippers and communities against those of the railroad. By embracing the ALJ's cost and balancing analysis, the majority opinion, in effect, holds that an abandonment is inconsistent with the "public convenience and necessity" whenever revenues exceed avoidable costs (though not total costs) and the railroad cannot prove that it cannot recapture lost traffic and that the funds to be saved from abandonment will be devoted only to rail-related purposes. By thus substituting its concept of the "public convenience and necessity" for that of the Commission, the Court of Appeals has—contrary to prior rulings of this Court—made the Commission's balancing of the interests of the railroads and shippers a "matter for judicial redecision." *See, e.g., Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, ___ U.S. ___, 101 S.Ct. 1124, 1132 (1981); *Purcell* v. *United States*, 315 U.S. 381, 384 (1942).[6]

Furthermore, the majority opinion severely restricts the scope of the "public convenience and necessity" standard by elevating two factors—avoidable costs and labor protection agreements—to a degree of importance totally inconsistent with the Interstate Commerce Act and prior decisions of this Court. The statutory standard to be applied by the Commission is the "public conve-

[6] *See also Mississippi Public Service Commission* v. *ICC*, 650 F.2d 551 (5th Cir. 1981).

nience and necessity" (49 U.S.C. § 10903(a)). The term "avoidable costs" does not appear in this section of the Act. As ICG stated in its petition for certiorari, the concept of "avoidable costs" is but one factor which the Commission considers in abandonment proceedings. It has *not* been the governing factor, because Congress intended the public convenience and necessity—not profitability—to be the standard in abandonment cases.[7] Indeed, as shown *supra*, the Commission has approved abandonments even when the line is profitable. The majority opinion, however, has made the avoidable cost concept the governing factor in abandonment cases.

Similarly, by holding that a prior labor agreement may result in the denial of an abandonment application, the majority opinion of the Court of Appeals would effectively convert future abandonment proceedings into breach-of-contract actions whenever the railroad and the union have made such an agreement. This would be totally contrary to a long line of cases holding that an abandonment application cannot be denied on the basis of a private contract[8] and that the Commission has no power to interpret contracts.[9]

Finally, the majority opinion of the Court of Appeals is contrary to the Interstate Commerce Act's policy of encouraging agreements between railroads and unions for the protection of workers upon abandonments. As it stated in its decision, the Commission has always encouraged the making of such agreements. Indeed, Section 10903(b)(2) of the Interstate Commerce Act, 49

[7]As ICG stated in its petition for certiorari, the fact that the revenues earned by a particular line exceed avoidable costs does not necessarily mean that the line is profitable.

[8]*See, e.g., Colorado* v. *United States*, 271 U.S. 153, 166-67 (1926), and other cases listed in ICG's Petition for Certiorari, at 19 n.17.

[9]*See, e.g., Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U.S. 382, 391 (1932); *Gulf, M. & N.R.R. Co.* v. *Illinois Cent. R.R.*, 21 F. Supp. 282, 290-91 (W.D. Tenn. 1937), *appeal dismissed*, 109 F.2d 1016 (6th Cir. 1940).

U.S.C. §10903(b)(2), *requires* the Commission to include in each certificate "provisions to protect the interests of employees." However, the decision of the Court of Appeals would effectively frustrate those policies. By ruling that the existence of an alleged protective agreement rendered the wages in question *un*avoidable costs, thereby creating an imaginary profit for the line and resulting in the denial of the abandonment application, the majority decision of the Court of Appeals will discourage railroads from voluntarily making such agreements in the future.

II. The Decision of the Court of Appeals Is Fundamentally Inconsistent With Decisions of Other Courts of Appeals

The majority opinion of the Court of Appeals is in direct conflict with prior decisions of courts of appeals holding that in abandonment cases the Commission is entitled to take an economically realistic view in determining what costs are to be considered in the calculation of the profit or loss of a line. Realizing that the Commission's determination is an important factor in its assessment of the "public convenience and necessity"—which Congress did not intend to be a "matter for judicial redecision"—these courts have deferred to the Commission's judgment. They have also rejected the contention that a cost may not be considered unless it will be avoided or eliminated *immediately* upon abandonment of the line. By contrast, the majority opinion in *City of Cherokee* imposes on the Commission a narrow view of the costs of a rail line, preventing the Commission from making a complete assessment of the economic situation of the line.

The approach of the majority of the panel of the Eighth Circuit in this respect is directly inconsistent with that of the Court of Appeals for the Seventh Circuit in *International Minerals & Chemical Corp.* v. *ICC*, ___ F.2d ___ (Nos. 80-2096 and 80-2097) (August 3, 1981). There, the Norfolk and Western Railway Company ("N&W") had filed an application to abandon

two branches of its rail network. Although the N&W had contended that the two branches were unprofitable, the ALJ who conducted the hearing on the abandonment application found that certain labor costs included in the N&W's calculation should be excluded because the employees were paid for work done not only on the two branches, but on other lines as well. Because the employees would continue to work on the other lines even after abandonment, the ALJ reasoned, the costs were jointly shared with other lines and were therefore not "avoidable." After excluding these costs, the ALJ found that the lines were sufficiently profitable and recommended that the applications be denied (slip opinion, at 2-3, 6). The full Commission, however, reversed the ALJ, ruling that the costs *were* avoidable and granting the application. The Commission based its avoidable cost ruling on *Illinois Central Gulf Company Railroad Abandonment*, 363 I.C.C. 93 (1980)—the very decision *reversed* by the majority of the Court of Appeals in *City of Cherokee.*

A panel of the Court of Appeals for the Seventh Circuit unanimously *affirmed* the Commission's ruling that the wages were avoidable costs (slip op. at 6-10). The court agreed with the Commission that a joint cost situation did not exist in the case. The Commission had stated in its *Illinois Central Gulf* decision that a true joint cost situation existed where two services ran over the same line, and only one of the services was eliminated (slip op. at 6-7). Here, no other railroad would be operating over the line upon abandonment. The employees would be freed upon abandonment for productive work elsewhere in the N&W network—work that "otherwise might require the hiring of new personnel or the payment of overtime or premium wages" (*id*).

The Court of Appeals for the Seventh Circuit further ruled in *International Minerals* that the Commission had *not* erred in relying on its prior *Illinois Central Gulf* decision, and in ruling that the labor costs were avoidable. Although the Seventh Circuit recognized that the opinion on which the Commission had relied

had been reversed upon judicial review, it distinguished the decision of the Court of Appeals for the Eighth Circuit as involving a labor agreement which was not a factor in N&W's case (slip op. at 7-8). The court stated that the principles underlying the Commission's *Illinois Central Gulf* decision were sound and that "the decision on whether or not employee transfers in fact will result in savings to the railroad is one for the ICC, not this Court" (slip op. at 10).[10]

Although the Court of Appeals for the Seventh Circuit in *International Minerals* distinguished the *City of Cherokee* decision as one involving a labor agreement, a careful reading of the Seventh Circuit's decision leaves no doubt that the reasoning of the two courts is in fundamental conflict. In both cases, opponents of abandonment had alleged that the wages in question were not avoidable costs because the railroad would continue to pay them following abandonment. Unless a particular cost could be eliminated immediately upon abandonment, they argued, it was not "avoidable." The Eighth Circuit agreed with this contention; the Seventh Circuit disagreed, recognizing that costs were avoidable

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[10]The deference accorded to the Commission's definition of the wages in question as avoidable costs by the Court of Appeals for the Seventh Circuit in *International Minerals* was well-founded. This Court has ruled that the Commission's determination of the public convenience and necessity—a determination in which the avoidable cost concept plays a part—is to be accorded considerable deference. *See, e.g., Chicago and North Western Transportation Co.* v. *Kalo Brick & Tile Co., supra*, 101 S.Ct. at 1132. Moreover, "avoidable cost is a 'word of art' unique to the railroad industry and is therefore virtually unheard of in economic literature." J. Price & F. Berardino, *Defining Economic Terms Used in the Railroad Revitalization and Regulatory Reform Act*, 9 Transp. L. J. 133, 154 n.39 (1977). Thus, when the Commission interprets its abandonment regulations—which classify wages for train and engine crews as avoidable costs—the substantial deference traditionally accorded to such interpretations should be, if anything, even greater because of the uniqueness of the avoidable cost concept and the Commission's experience in the area. *See* 49 C.F.R. §§1121.32(d), 1121.42(c)(1)-(2), 1121.46; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

as long as they would *eventually* be eliminated as a result of abandonment."

As Illinois Central Gulf has noted in its petition for certiorari, the majority opinion in *City of Cherokee* is also contrary to two cases which have held that the Commission may take opportunity costs into account in the determination of the profitability of a line. *See Farmland Industries, Inc.* v. *United States*, 642 F.2d 208 (7th Cir. 1981); *Missouri Pacific R.R.* v. *United States*, 625 F.2d 178 (8th Cir. 1980). Like *International Minerals*, these cases recognize that the Commission is entitled to take a realistic view of the economic and financial situation of a rail line in abandonment cases. Furthermore, they reject the holding of the majority in *City of Cherokee* that the inability of a railroad to eliminate a particular cost *immediately* upon abandonment dictates exclusion of such costs from the Commission's considerations. These cases recognize, as did this Court in *Colorado* v. *United States*, 271 U.S. 153, 165-69 (1926), that the Commission is entitled—indeed, *required*—to consider *all* possible relevant factors in abandonment proceedings.

"Although the Court of Appeals for the Seventh Circuit affirmed the Commission's determination of the avoidable cost issue as a whole, it did remand the case to the Commission to determine whether maintenance and labor crew expenses on a portion of one of the lines were avoidable costs. That portion was also utilized by Conrail pursuant to a trackage rights agreement, and the evidence indicated that Conrail would be allowed to operate on the track even if N&W's abandonment application were approved. Because the record did not indicate whether the wages attributable to that portion were included in the Commission's computation of avoidable labor costs, the case was remanded to the Commission for a decision on whether a readjustment of such costs (if one was necessary) affected the Commission's prior decision to grant the application (slip op. at 10). In so acting, the court was simply adhering to the Commission's definition of "joint costs." If the N&W and Conrail served a portion of a given line, and Conrail would continue to operate on the line after N&W's abandonment, the wages attributable to that portion would be joint costs and therefore not avoidable.

Because of the conflict between the *City of Cherokee* decision on the one hand and the decisions in *International Minerals*, *Farmland Industries*, and *Missouri Pacific* on the other, this Court should issue a writ of certiorari.

III. The Decision of the Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Review of Agency Decisions As To Call For Exercise of This Court's Power of Supervision

As the Commission and the ICG have stated in their petitions for certiorari, in reviewing the Commission's decision in this case, the Court of Appeals has made obvious and fundamental errors which should not be allowed to stand. In the first place, the court's rejection of the Commission's treatment of avoidable costs was based on a total mischaracterization of the decision of the Commission. Although the majority opinion of the Court of Appeals asserted that the Commission equated avoidable costs with joint costs, precisely the *opposite* is true, as a reading of the Commission's decision demonstrates. As the Court of Appeals for the Seventh Circuit found in *International Minerals*, the Commission stated that the concept of avoidable costs is *in opposition to* the concept of joint costs (slip op. at 6-7).

Second, the Court of Appeals was inconsistent in upholding the Commission's determination that property taxes of the railroad constituted avoidable costs, while ruling that the crew wages did not. In both cases, the cost would be "avoided" *ultimately*, although not *immediately*, as a result of abandonment. The Court of Appeals had no rational basis for treating the two costs differently.

Third, the court's comparison of the decisions of the Commission and the ALJ to determine which was preferable in its determinations of the wage issue and of the "public convenience and necessity" was plainly improper under the holdings of this Court

in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), and *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). In those cases, this Court ruled that an appellate court is to review only the *agency's* decision to determine whether it is supported by reasoned analysis and whether the findings of the agency are supported by the record. *Universal Camera* and *Allentown* hold that, although the reviewing court may take into account the findings and opinion of an ALJ when the agency has rejected his recommendation, it may *not* compare the analyses of the ALJ and the agency and determine that one is "better" than the other.

If future courts of appeals may compare and choose between the decisions of the ALJ and the Commission, the Commission will have been divested of its exclusive responsibility for deciding these issues. Should the Commission decide to reject the recommendation of an ALJ (as it did in this case), its opinion may be compared with the ALJ's for "correctness" by an appellate court. To avoid such comparison, the Commission will be under pressure to adopt the recommendation of the ALJ unless it believes the ALJ has committed plain error. In short, the majority decision of the Court of Appeals vests the powers to decide abandonment cases in administrative law judges and the courts of appeals. Not only is this result contrary to the abandonment statutes, but it also contravenes those provisions of the judicial code which state that it is the final decision of *the Commission* that is to be reviewed by the courts of appeals. *See* 28 U.S.C. §§2321(a), 2342.

Finally, the Court of Appeals erred in addressing an issue not raised or briefed by *any* of the parties in the case—the adequacy of the Commission's balancing of the benefit of abandonment to the railroads against the inconvenience that abandonment would cause to shippers and communities served by the line. The Eighth Circuit itself has stated that an issue not raised in a brief will be regarded as abandoned and entitled to no consideration by that court unless the issue is one of public concern or constitutes plain

error on the face of the record which will result in a miscarriage of justice absent review. *See, e.g., Harris* v. *Smith*, 372 F.2d 806 (8th Cir. 1967); *Andrews* v. *Olin Mathieson Corp.*, 334 F.2d 422 (8th Cir. 1964).[12] Nowhere in its decision did the Court of Appeals attempt to justify its consideration of this issue on the basis of any of these exceptions (for it plainly could not). Clearly, the majority of the Court of Appeals acted improperly in reaching this issue, and its approach should be rejected by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit. Indeed, as the Commission argued in its petition for certiorari, the errors of that judgment and opinion are so plain that the Court should properly consider summary disposition on the merits, pursuant to Rule 23.1.

Respectfully submitted,

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September 9, 1981

[12]This also appears to be the rule in other courts of appeals. *See, e.g., Kemlon Products & Development Co.* v. *United States*, 646 F.2d 223, 224 (5th Cir. 1981); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 608-09 & n.9 (7th Cir. 1981); *Hernandez* v. *County of Los Angeles*, 624 F.2d 935, 937 & n.2 (9th Cir. 1980).

APPENDIX

Members of the Association of American Railroads

Akron, Canton & Youngstown Railroad Company
Alton & Southern Railway Company
Atchison, Topeka & Santa Fe Railway Company
Atlanta & St. Andrews Bay Railway Company

Baltimore & Ohio Railroad Company
    Curtis Bay Railroad Company
    Staten Island Railroad Corporation
Baltimore & Ohio Chicago Terminal Railroad Company
Bangor & Aroostook Railroad Company
    Van Buren Bridge Railroad
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Boston and Maine Corporation
    Springfield Terminal Railway
Burlington Northern Railroad Company
    Oregon Electric Railway
    Oregon Trunk Railway
    Walla Walla Valley Railway

Cambria & Indiana Railroad Company
[Canadian Pacific Limited—lines operated in U.S.]:
    Aroostook Valley Railroad
    Canadian Pacific lines in Maine
    Canadian Pacific lines in Vermont
Chesapeake & Ohio Railway Company
    Covington & Cincinnati Elevator Railroad
      & Transfer & Bridge Company
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
    Washington, Idaho & Montana Railway Company
Clinchfield Railroad Company
Colorado & Southern Railway Company
Consolidated Rail Corporation

Delaware & Hudson Railway Company
    Greenwich & Johnsonville Railway Company

Denver & Rio Grande Western Railroad Company
Detroit & Mackinac Railway Company
Detroit & Toledo Shore Line Railroad Company
Duluth, Missabe & Iron Range Railway Company

Elgin, Joliet & Eastern Railway Company

Fort Worth & Denver Railway Company

Galveston, Houston & Henderson Railroad Company
Georgia Railroad
[Grand Trunk Corporation—and other lines in the U.S. indirectly controlled by the Canadian National Railways]:
Grand Trunk Western Railroad Company
Detroit, Toledo & Ironton Railroad Company
Central Vermont Railway, Inc.
Duluth, Winnipeg & Pacific Railway Company

[Canadian National Railways]:
Lines in Michigan
Lines in New England
Lines in New York
Lines in Vermont
Green Bay & Western Railroad Company

Houston Belt & Terminal Railway Company

Illinois Central Gulf Railroad Company
Chicago & Illinois Western Railroad Company
Waterloo Railroad

Kansas City Southern Railway Company
Arkansas & Western Railway Company
Fort Smith & Van Buren Railway Company
Kansas & Missouri Railway & Terminal Company
Kentucky & Indiana Terminal Railroad

Lake Superior & Ishpeming Railroad Company
Louisiana & Arkansas Railway Company
Louisville & Nashville Railroad Company
Carrollton Railroad Company

McCloud River Railroad Company
Maine Central Railroad Company
Portland Terminal Company
Manufacturers Railway Company

Minneapolis, Northfield & Southern Railway Company
Missouri-Kansas-Texas Railroad Company
including Beaver, Meade & Englewood Railroad Company
Missouri Pacific Railroad Company
Chicago Heights Terminal Transfer Company
Doniphan, Kensett & Searcy Railway Company
New Orleans & Lower Coast Railroad Company
Brownville & Matamoras Bridge Terminal Company
Weatherford Mineral Wells and Northwestern Railway Company

National Railroad Passenger Corporation (AMTRAK)
Norfolk and Western Railway Company
Chesapeake Western Railway Company
Lake Erie & Fort Wayne Railroad Company
Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin & Danville Railway Company

Peoria & Pekin Union Railroad Company
Pittsburg & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
Montour Railroad Company
Youngstown & Southern Railway Company
Prescott & Northwestern Railroad Company

Richmond, Fredericksburg & Potomac Railroad Company

St. Louis Southwestern Railway Company
Seaboard Coast Line Railroad Company
Columbia, Newberry and Laurens Railroad Company
Durham & Southern Railway Company
Gainesville Midland Railroad Company
Soo Line Railroad Company
Sault Ste. Bridge Company
Southern Pacific Transportation Company
Holton Inter-Urban Railway Company
Northwestern Pacific Railroad Company
Petaluma & Santa Rosa Railroad Company
San Diego & Arizona Eastern Railway Company
Visalia Electric Railroad Company

Southern Railway System
- Alabama Great Southern Railroad Company
- Algers, Winslow & Western Railway Company
- Atlantic & East Carolina Railway Company
- Camp Lejeune Railway Company
- Central of Georgia Railroad Company
- Cincinnati, New Orleans & Texas Pacific Railway Company
- Georgia Northern Railway Company
- Georgia Southern & Florida Railway Company
- Interstate Railroad Company
- Live Oak Perry & South Georgia Railway Company
- Louisiana & Southern Railway Company
- New Orleans Terminal Company
- Norfolk Southern Railway Company
- St. Johns River Terminal Company
- State University Railroad Company
- Tennessee, Alabama & Georgia Railway Company
- Tennessee Railway Company

Texas Mexican Railway Company

Union Pacific Railroad Company
- Spokane International Railroad Company
- Mt. Hood Railway Company

Union Railroad Company (Pittsburgh)

Vermont Railway, Inc.

Western Maryland Railway Company
Western Pacific Railroad Company
- Sacramento Northern Railway Company
- Tidewater Southern Railway Company

Western Railway of Alabama
- Atlanta & West Point Rail Road Company

Winston-Salem Southbound Railway
- High Point, Thomasville & Denton Railroad

Special Canadian and Mexican Member Roads

Canadian Lines (in Canada)
- Algoma Central Railway
- Canadian National Railways

Canadian Pacific Limited
includes Dominion Atlantic Railway and Quebec Central Railway
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway

Mexican Lines (in Mexico)
Chihuahua Pacific Railway Company
[Direccion General de Ferrocarriles en Operation]:
Ferrocarril Sonora-Baja California, S.A. de C.V.
Ferrocarriles Unidos del Sureste, S.A. de C.V.
Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

Associate Members

Alaska Railroad (ALASKA)
Aliquippa & Southern Railroad Company
American Refrigerator Transit Company
Ann Arbor Railroad System
Apalachiocola Northern Railroad Company

Belfast & Moosehead Lake Railroad Company
Birmingham Southern Railroad Company
British Columbia Hydro & Power Authority (CANADA)
British Columbia Railway (CANADA)
Brooklyn Eastern District Terminal Railroad

California Western Railroad
Chestnut Ridge Railway
Chicago Short Line Railway Company
Chicago South Shore & South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Chilean State Railways (CHILE, S.A.)
Cities Service Company Railroad
Cliffs Western Australian Mining Co. Pty. Ltd. (AUSTRALIA)
Colorado & Wyoming Railway Company
Cuyahoga Valley Railway Company

Dardanella & Russellville Railroad
Delray Connecting Railroad Company
Devco Railway (Cape Breton Dev. Corp.—Coal Div.) (CANADA)

Duluth & Northwestern Railroad Company

East Erie Commercial Railroad
East Jersey Railroad & Terminal Company
East St. Louis Junction Railroad Company
Empresa Minera Del Centrao Del Peru Railways (PERU, S.A.)
Essex Terminal Railway (CANADA)

Fepasa-Ferrovia Paulista (BRAZIL, S.A.)
Fruit Growers Express Company

Genessee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company

Hamersley Iron Pty. Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad (Itel Rail Corporation)
Hillsdale County Railway Company, Inc.

Japanese National Railways (JAPAN)
Johnstown & Stony Creek Railroad Company

Korean National Railroad (KOREA)

Lake Terminal Railroad Company
LaSalle & Bureau County Railroad Company
Lenawee County Railroad Company, Inc.
Long Island Rail Road Company
Louisiana & North West Railroad Company

McKeesport Connecting Railroad Company

Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummerstown Railroad Company
Minnesota, Dakota & Western Railway Company
Monogahela Connecting Railroad Company

New Orleans Public Belt Railroad
Newburgh & South Shore Railway Company

Pacific Fruit Express Company
Pearl River Valley Railroad Company
Pickens Railroad—National Railway Utilization Corp.
Port Authority of New York & New Jersey (The)
Providence & Worcester Company
Public Transport Commission of New South Wales (AUSTRALIA)

Quebec, North Shore & Labrador Railway Company (CANADA)

Rede Ferroviaria Federal S.A. (BRAZIL)
River Terminal Railway Company
Roverval & Saguenay Railway Company (CANADA)
Roscoe, Snyder & Pacific Railway Company

San Diego & Arizonia Eastern Transportation Company
Sierra Railroad Company (California)
South African Railways (REPUBLIC OF SOUTH AFRICA)
Southern Indiana Railway, Inc.
Spanish National Railways (RNFE) (SPAIN)

Taiwan Railway Administration (REPUBLIC OF CHINA)
Texas & Northern Railway Company

Upper Merion & Plymouth Railroad Company

Victoria A. Minas Railway (BRAZIL)

Wabash Valley Railroad Company
Wabush Lake Railway Ltd. (CANADA)
Warwick Railway Company
Washington Terminal Company
Western Australian Government Railways (AUSTRALIA)

Yancy Railroad Company
Youngstown & Northern Railroad Company